United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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To be argued by:
Lisa H. Blitman, Esq.

UNITED STATES COURT OF APPEALS

For the Second Circuit

JOSEPHINA DUCHESNE, et al.,

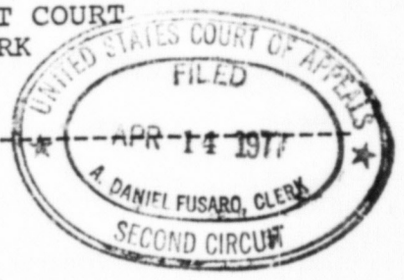
Plaintiffs-Appellants,

against

JULE M. SUGARMAN, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



REPLY BRIEF FOR APPELLANTS

LISA H. BLITMAN, ESQ.
Attorney for Appellants
24 West 87th Street
New York, New York 10024

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PRELIMINARY STATEMENT

Appellees, New York Foundling Hospital and St. Joseph's Home of Peekskill, have submitted a brief setting forth four main arguments: First, that Boone v. Wyman, 412 F.2d 857 (2nd Cir., 1969) is decisive of Appellants' allegation of violation of constitutional rights; second, that there is no state action and Appellees did not act under color of law; third, that Appellees are immune from liability for damages; and fourth, that appellees should be awarded costs and attorney's fees. In this reply brief, Appellants will respond to each of these arguments.

Appellees Sugarman, Beine and Fass did not file a brief in this appeal.

POINT I

APPELLEES' BRIEF HAS FAILED TO REFUTE THE FACT THAT APPELLEES VIOLATED APPELLANTS' CONSTITUTIONAL RIGHTS

The brief submitted by St. Joseph's and New York Foundling Hospital does not deny the fact that there is a constitutional right to maintain a family unit, and that this right can not be denied without due process of law. The defendants appear to argue only that this constitutional right is not relevant to this action. Plaintiffs assert that this essential constitutional right to live peaceably within a family has been established and that the facts show that defendants denied plaintiffs this consititutional right

when they detained infant plaintiffs for over two years without authorization.

A. Prior to Stanley v. Illinois, the Constitutional Right to Maintain the Integrity of the Family Unit Had Been Recognized.

As set forth in Point I, subdivision A of Appellants' main brief, the United States Supreme Court consistently recognized, long before Stanley v. Illinois, 405 U.S. 645 (1972), that the right to raise one's children, and the right to maintain a family is a basic and essential right which is protected by the United States Constitution. See, Meyer v. Nebraska, 262 U.S. 390 (1923); Skinner v. Oklahoma, 316 U.S. 535; Prince v. Massachusetts, 321 U.S. 158 (1944). The district court recognized this constitutional right in its order dated June 23, 1975 (A. 36) in which it stated:

> It is a fair reading of Stanley v. Illinois, 405 U.S. 645 (1972), that there is a constitutional mandate under the Fourteenth Amendment that no child be taken from a biological parent, wed or unwed, without a hearing as to fitness of the parent.
>
> In the instant case, it is clearly alleged that, from the date of the original taking of the children through the date of the Family Court finding, there had been no such hearing. Therefore, a violation of a Fourteenth Amendment right has been properly claimed.

Defendants-Appellees New York Foundling Hospital and St. Joseph's do not deny the existence of this constitutional right. Therefore, due process requirements prohibit defendants from depriving plaintiffs of their fundamental right to live together as a family

without affording plaintiffs notice, and an opportunity to be heard.

In the instant case, plaintiffs were denied the right to live together as a family when defendants, St. Joseph's and New York Foundling Hospital, took custody of infant plaintiffs on December 17, 1969. Defendants St. Joseph's and New York Foundling Hospital detained infant plaintiffs for over two years over the objections of their mother, plaintiff Perez, without affording plaintiffs notice of any charges or the benefit of a hearing, and without seeking or obtaining judicial authorization. Defendants do not dispute these facts. It was only after plaintiff Perez obtained a writ of habeas corpus from the New York Supreme Court on February 22, 1972 that defendants sought judicial authorization of their detention of infant plaintiffs by commencing a neglect proceeding in New York Family Court, and requesting a Family Court order directing that custody of infant plaintiffs continue with defendants pending the adjudication of the neglect proceeding.

B. Defendants Violated Plaintiffs' Constitutional Rights By Detaining the Children for Over Two Years Without Authorization and Without Due Process of Law.

The gist of plaintiffs' claim is that defendants falsely imprisoned the children for over two years and thereby violated plaintiffs' constitutional rights. Defendants do not dispute the fact that they detained infant plaintiffs for over two years with-

out legal authorization. A detention such as plaintiffs, without legal authorization has been recognized to violate the constitution in Johnson v. Greer, 477 F.2d 101 (5th Cir., 1973). In Johnson, the plaintiff was placed in a psychiatric hospital pursuant to an emergency warrant which in accordance with state law permitted the hospital to detain him for 24 hours. After twenty-four hours, the hospital was required to apply for court authorization for continued custody. However, the hospital detained plaintiff for five days without obtaining further authorization. The Johnson court held that the hospital had unreasonably delayed in obtaining authorization for its detention and that it had falsely imprisoned the plaintiff and thereby denied him his constitutional right to liberty and due process of law. The court noted:

> Rather than adhering to the statutory procedure and obtaining a court order to detain Johnson, Greer failed to even attempt to follow the provisions of that law intended to protect the rights and liberty of those who are or are thought to be mentally ill. (Johnson, supra at 105).

The Johnson case is analogous to the case at bar where defendants detained infant plaintiffs without legal authorization. Plaintiffs in the case at bar have suffered a violation of their constitutional rights under the same theory and in the same manner as the plaintiff in the Johnson case.

C. Boone v. Wyman Does Not Permit Defendants to Deny Plaintiffs Their Constitutional Rights By Detaining Them For Two Years Without Authorization.

Defendants have offered no justification for their detention without legal authorization, but argue that under Boone v. Wyman, supra, they are permitted to detain plaintiffs without authorization. It is respectfully asserted that defendants' reliance on Boone v. Wyman is misplaced for the following two reasons. First, Boone v. Wyman is factually different from the case at bar because in Boone, the parent had executed a lawful written surrender and the custody was, therefore, in accordance with and governed by the New York Social Services Law including Section 383 prohibiting the return of the child without the Commissioner's consent. The father in Boone commenced an action in the District Court seeking: (a) a declaration that Section 383 was unconstitutional; and (b) an injunction requiring that custody of the child be returned to the parent. The court held that Section 383 was not unconstitutional and that the Commissioner did not violate the parent's constitutional right where he continued custody pursuant to this statute. In Boone, the Commissioner commenced and continued custody in a lawful manner and in compliance with the New York Social Services Law. In the case at bar, the facts demonstrate that the custody of infant plaintiffs, unlike Boone, neither commenced, nor continued in a lawful manner or in compliance with New York law. Therefore, the holding in Boone is not dispositive of plaintiffs' allegation of denial of a basic constitutional right.

Second, the holding in Boone does not stand for the proposition that there is no constitutional violation where defendants commence and continue custody for over two years over a parent's objection and without judicial authorization. Indeed, neither the holding in Boone, nor any other legal argument can be urged in support of that position.

D. Irrespective of Whether An Emergency Existed, New York Foundling and St. Joseph's Violated Plaintiffs' Constitutional Rights By Detaining the Children For Two Years Without Authorization.

Throughout its brief, St. Joseph's and New York Foundling Hospital appear to argue that their detention of the children without authorization was constitutionally permissible because they assessed the situation to be an emergency. At trial, New York Foundling Hospital testified that it was authorized in an emergency to take custody of children without parental consent or court authorization, and that it was empowered to continue that custody without judicial authorization so long as it deemed the emergency to exist (A. Statement of Evidence, p. 13, ¶¶3-4). It appears that infant plaintiffs were detained for two years pursuant to this emergency policy.

Clearly this policy of defendants is in violation of the constitutional right to maintain a family, and the requirement that this right not be denied without due process of law. Due process requires that regardless of defendants' determination that an emergency exists, plaintiffs be afforded notice and a hearing before

or immediately following defendants' taking of infant plaintiffs. Plaintiffs cannot be made to suffer the grievous loss of their family without notice and a hearing. See, Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) and Goldberg v. Kelly, 397 U.S. 254 (1970). This right to a hearing is not obviated as defendants suggest because defendants conclude that an emergency exists.

Defendants' emergency policy demonstrates defendants' ignorance of the established constitutional right to a hearing at the time of, or immediately following, a child's removal from the home over parental objection. Ignorance of the law, of course, is no defense to plaintiffs' claim that defendants violated their constitutional rights. Defendants are not expected to be sophisticated constitutional lawyers, but it is not unreasonable to expect them to have some knowledge of the law which governs their conduct. Glasson v. City of Louisville, 518 F.2d 899 at 910 (6th Cir., 1975) cert. denied, 96 S.Ct. 280.

E. Plaintiffs Did Not Concede That Defendants' Custody In December, 1969, Was Lawful.

Defendants argue that Boone is applicable because plaintiffs conceded at trial that the initial placement was proper. Plaintiffs did not make such a concession at trial. The very nature and essence of this action as set forth in the complaint is that defendants unlawfully took and retained custody of infant plaintiffs in violation of the constitutional rights of both infant plaintiffs and plaintiff Perez. At no time did plaintiffs concede or stipu-

late that the taking of infant plaintiffs was proper. The district court stated in its order dated April 26, 1976 (A. 43) that the initial custody in December 1969 was proper and that plaintiffs had so conceded "that there is no issue as to this." When the district court read this order into the record on April 26, 1976, plaintiffs' counsel respectfully noted her objection, and plaintiffs' counsel attempted to argue that Boone was distinct and inapplicable because the placement in Boone, unlike plaintiffs, was lawful and based on a voluntary written surrender. Because the District Court ordered that plaintiffs, who had in forma pauperis status below, should not be afforded the trial transcript for purposes of this appeal, plaintiffs are unable to prove that they did not concede that the initial custody was proper. However, logic and the facts of this case support plaintiffs' assertion that no such concession was made. Plaintiffs have consistently maintained in this action that their constitutional rights were violated because defendants took and continued custody of infant plaintiffs without affording plaintiffs notice or a hearing. Defendants' custody was not lawful when it commenced, nor was there any authority for the custody until March 7, 1972, over two years later, when the New York Family Court issued a temporary order directing that custody remain with defendants pending adjudication. Plaintiffs never conceded that defendants' custody between December 17, 1969 and March 7, 1972 was lawful.

F. Irrespective Of Whether Infant Plaintiffs Are Labeled "Destitute", Defendants' Detention Violated Plaintiffs' Constitutional Rights.

Defendants have argued in Point I of their brief that infant plaintiffs were "destitute" children. As set forth in Point II, subdivision B(ii) of Appellants' main brief, there is no basis for finding that defendants categorized infant plaintiffs as destitute. However, plaintiffs emphasize that regardless of whether defendants labeled infant plaintiffs as "destitute" or "neglected" the facts still show that defendants' violated plaintiffs' constitutional rights by detaining the children for over two years without court authorization and over the parent's objection. This unconstitutional conduct will not disappear by labeling the children "destitute." There is no legal basis for defendants' conduct in detaining these children even if they are designated destitute. Neither "destitute" nor any other children can be taken from their parent's custody without due process of law.

G. The Dismissal of Plaintiff Perez's Habeas Corpus Application Does Not Affect the Claim that Defendants Denied Plaintiffs Their Constitutional Rights.

Defendants refer, at page 18 of their brief, to the fact that the Appellate Division sustained the dismissal of plaintiff Perez's habeas corpus petition. The state court dismissal of the habeas corpus application is not determinative of plaintiff's claim that they have been denied their constitutional right to maintain their family unit. When the state habeas corpus was filed in February

1972, plaintiff Perez alleged that defendants lacked legal authorization for their detention of infant plaintiffs. By the time the habeas corpus was consolidated with the neglect proceeding and heard in November 1972, the defendants had obtained a temporary order of remand from the Family Court directing that the status quo be maintained and that plaintiffs remain in defendants' custody pending adjudication of the neglect proceeding. Therefore, at the time of the hearing, defendants had obtained court authorization of their detention and plaintiffs' claim that the detention was unauthorized had been superceded and mooted by the intervening Family Court order. The District Court recognized that the habeas corpus application was dismissed because defendants had obtained legal authorization subsequent to the commencement of the writ. In an order (A. 36), dated June 23, 1975, the District Court dismissed defendants' motion for summary judgment and its motion to dismiss and held:

> It appears to this court that the petition for habeas relief was dismissed because at the time the children were properly within the jurisdiction of the Family Court. However, that determination does not decide the issue before this court namely, does the complaint state a claim for a violation of a federal constitutional right? (Emphasis in original).

POINT II

THIS COURT'S PRIOR FINDING OF STATE ACTION SHOULD BE APPLIED AS LAW OF THE CASE

Appellees urge in Point II of their brief that the District Court lacked jurisdiction because there is no state action. This Court determined in a prior appeal, Perez v. Sugarman, 499 F.2d 761 (2nd Cir., 1974), that the actions of St. Joseph's and New York Foundling Hospital with respect to plaintiffs constitute state action. This was based on this Court's finding that the institutions were performing a public function which was governmental in nature, and that the State had "insinuated itself into the actions of the private defendants here" (Perez, supra at 765). This Court pointed out that the State was using defendants' "private facilities to accomplish the public purpose" of caring for children which had been mandated by the New York Social Services Law (Perez, supra at 766). This finding of State action must be applied to the within appeal as law of the case. Moreover, this finding is not negated, as defendants suggest, by Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). In Jackson, the court found no state action because although the utility company engaged in a business which was affected with a public interest, it was not performing a public function which the state was obliged by law to perform. This court has commented on the meaning of Jackson in New York City Jaycees Inc. v. United States Jaycees Inc., 512 F.2d 856 (1975), and noted that:

> Jackson v. Metropolitan Edison Co., supra, has suggested that the service involved must not only be one which is traditionally the exclusive prerogative of the state but that it must in addition be one which the state itself is under an affirmative duty to provide. New York City Jaycees at 860.

The Jackson criteria for state action is present in the instant case where the State is obliged by the New York Social Services Law to provide child care and this publ.. du· nas been delegated to defendants and is performed by defendants in partnership with the State. This Court's prior finding of State action is undisturbed by Jackson v. Metropolitan Edison Co. This court also held in the prior appeal that the defendant institutions were "persons" who are subject to a §1983 action, Perez supra, at 765, footnote 5.

POINT III

THE DOCTRINE OF IMMUNITY WILL NOT INSULATE ST. JOSEPH'S AND NEW YORK FOUNDLING HOSPITAL FROM LIABILITY

The doctrine of immunity will not protect St. Joseph's and New York Foundling Hospital from liability for their conduct which resulted in plaintiffs suffering a loss of their constitutional right to maintain the integrity of their family. The following reasons preclude the application of official immunity.

First, defendants St. Joseph's and New York Foundling Hospital did not raise immunity as a defense in their answers to the complaint.

Second, the defense of immunity is not available to defendants St. Joseph's and New York Foundling Hospital. The District Court noted in its Order dated April 26, 1976 (A. 45), that it did not "reach the question of whether defendants here [St. Joseph's and

New York Foundling Hospital] are entitled to the qualified immunity referred to in Wood v. Strickland."

Third, the defense of immunity is not absolute. If it is determined that defendants may use the defense of qualified immunity, the trial court must first determine whether the evidence supports the defense, and whether the defendants have proven that: (a) they acted with good faith that their conduct was lawful, and (b) that it was reasonable, in light of the circumstances, for defendants to believe their conduct was lawful. Guzman v. Western State Bank, 540 F.2d 948 (8th Cir., 1976); Economou v. Butz, 535 F.2d 688 (2nd Cir., 1976), cert. granted. Because the defense of immunity rests on a finding of fact with respect to good faith, and because the District Court did not reach or determine this finding of fact, this appeal cannot determine whether defendants can avoid liability with the defense of immunity.

POINT IV

PLAINTIFFS SHOULD NOT BE REQUIRED TO PAY COSTS OR ATTORNEY'S FEES

Plaintiff Perez died on December 30, 1975, and upon information and belief, there are no assets in her estate. Plaintiff Daniel Cruz is 13 years old and Plaintiff Marisol Lopez is 7 years old. Upon information and belief, neither infant plaintiffs have any financial assets. This action was granted in forma pauperis status

in the District Court, and because of plaintiffs' indigency, this Court ordered that the appeal be perfected on the original record and on typewritten briefs and waived the docketing fee. Because of plaintiffs' indigency, it is not appropriate for this Court to require plaintiffs to pay costs. Nor is it appropriate to award attorney's fees to defendants.

CONCLUSION

For the reasons set forth within, the Court below erred in dismissing the complaint. Accordingly, Appellants pray that this Court reverse the judgment appealed from and for such other, further and different relief as to the Court may seem just.

Respectfully submitted,

Lisa H. Blitman

LISA H. BLITMAN, ESQ.
Attorney for Appellants
24 W. 87th Street
New York, New York 10024

DATED: New York, New York
April 14, 1977

ATTORNEY'S AFFIRMATION OF SERVICE

Re: Duchesne et. al. v. Sugarman
et. al.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Lisa H. Blitman, an attorney duly admitted to practice in the State of New York, hereby affirms the following to be true under penalty of perjury:

That she is over the age of 18 years and that she is not a party to the above-referenced proceeding and that her business address is 15 Park Row, New York, New York 10038.

That on April 15, 1977 she served a copy of Appellants' Reply Brief in the above-referenced proceeding.

That these papers were served by personally delivering/ mailing a copy of Bodell & Magovern, 102 E. 35th St. NYC New York, New York. New York, Corporation Counsel, Municipal Bldg, N.Y.C

Lisa H. Blitman
Lisa H. Blitman

Dated: New York, New York
April 15, 1977